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The Police State Is Closer Than You Think

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Police states are easier to acquire than Americans appreciate.

The hysterical aftermath of September 11 has put into place the main components of a police state.

Habeas corpus is the greatest protection Americans have against a police state. Habeas corpus ensures that Americans can only be detained by law. They must be charged with offenses, given access to attorneys, and brought to trial. Habeas corpus prevents the despotic practice of picking up a person and holding him indefinitely.

President Bush claims the power to set aside habeas corpus and to dispense with warrants for arrest and with procedures that guarantee court appearance and trial without undue delay. Today in the US, the executive branch claims the power to arrest a citizen on its own initiative and hold the citizen indefinitely. Thus, Americans are no longer protected from arbitrary arrest and indefinite detention.

These new “seize and hold” powers strip the accused of the protective aspects of law and give reign to selectivity and arbitrariness. No warrant is required for arrest, no charges have to be presented before a judge, and no case has to be put before a jury. As the police are unaccountable, whoever is selected for arrest is at the mercy of arbitrariness.

The judiciary has to some extent defended habeas corpus against Bush’s attack, but the protection that the principle offers against arbitrary seizure and detention has been breeched. Whether courts can fully restore habeas corpus or whether it continues in weakened form or passes by the wayside remains to be determined.

Americans may be unaware of what it means to be stripped of the protection of habeas corpus, or they may think police authorities would never make a mistake or ever use their unbridled power against the innocent. Americans might think that the police state will only use its powers against terrorists or “enemy combatants.”

But “terrorist” is an elastic and legally undefined category. When the President of the United States declares: “You are with us or against us,” the police may perceive a terrorist in a dissenter from the government’s policies. Political opponents may be regarded as “against us” and thereby fall in the suspect category. Or a police officer may simply have his eye on another man’s attractive wife or wish to settle some old score. An enemy combatant might simply be an American who happens to be in a foreign country when the US invades. In times before our own when people were properly educated, they understood the injustices that caused the English Parliament to pass the Habeas Corpus Act of 1679 prohibiting the arbitrary powers that are now being claimed for the executive branch in the US.

The PATRIOT Act has given the police autonomous surveillance powers. These powers were not achieved without opposition. Civil libertarians opposed it. Bob Barr, the former US Representative who led the impeachment of President Clinton, fought to limit some of the worst features of the act. But the act still bristles with unconstitutional violations of the rights of citizens, and the newly created powers of government to spy on citizens has brought an end to privacy.

The prohibition against self-incrimination protects the accused from being tortured into confession. The innocent are no more immune to pain than the guilty. As Stalin's show trials demonstrated, even the most committed leaders of the Bolshevik revolution could be tortured into confessing to be counter-revolutionaries.

The prohibition against torture has been breeched by the practice of plea bargaining, which replaces jury trials with negotiated self-incrimination, and by sentencing guidelines, which transfer sentencing discretion from judge to prosecutor. Plea bargaining is a form of psychological torture in which innocent and guilty alike give up their right to jury trial in order to reduce the number and severity of the charges that the prosecutor brings.

The prohibition against physical torture, however, held until the US invasions of Afghanistan and Iraq. As video, photographic, and testimonial evidence make clear, the US military has been torturing large numbers of people in its Iraq prisons and in its prison compound at Guantánamo Bay, Cuba. Most of the detainees were people picked up in the equivalent of KGB Stalin-era street sweeps. Having no idea who the detainees are and pressured to produce results, torture was applied to coerce confessions.

Everyone is disturbed about this barbaric and illegal practice except the Bush administration. In an amendment to a $440 billion defense budget bill last Wednesday, the US Senate voted 90 to 9 to ban "cruel, inhuman or degrading treatment or punishment" of anyone in US government custody. President Bush responded to the Senate's will by repeating his earlier threat to veto the bill. Allow me to torture, demands Bush of the Senate, or you will be guilty of delaying the military's budget during wartime. Bush is threatening the Senate with blame for the deaths of US soldiers who will die because they don't get their body armor or humvee armor in time.

It will be a short step from torturing detainees abroad to torturing the accused in US jails and prisons.

The attorney-client privilege, another great achievement, has been breeched by the Lynne Stewart case. As the attorney for a terrorist, Stewart represented her client in ways disapproved by prosecutors. Stewart was indicted, tried, and convicted of providing material support to terrorists.

Stewart's indictment sends a message to attorneys not to represent too dutifully or aggressively clients who are unpopular or demonized. Initially, this category may be limited to terrorists. However, once the attorney-client privilege is breeched, any attorney who gets too much in the way of a prosecutor's case may experience retribution. The intimidation factor can result in an attorney presenting a weak defense. It can even result in attorneys doing as the Benthamite US Department of Justice (sic) desires and helping to convict their client.

In the Anglo-American legal tradition, law is a shield of the accused. This is necessary in

order to protect the innocent. The accused is innocent until he is proven guilty in an open court. There are no secret tribunals, no torture, and no show trials.

Outside the Anglo-American legal tradition, law is a weapon of the state. It may be used with careful restraint, as in Europe today, or it may be used to destroy opponents or rivals as in the Soviet Union and Nazi Germany.

When the protective features of the law are removed, law becomes a weapon. Habeas corpus, due process, the attorney-client privilege, no crime without intent, and prohibitions against torture and ex post facto laws are the protective features that shield the accused. These protective features are being removed by zealotry in the "war against terrorism."

The damage terrorists can inflict pales in comparison to the loss of the civil liberties that protect us from the arbitrary power of law used as a weapon. The loss of law as Blackstone's shield of the innocent would be catastrophic. It would mean the end of America as a land of liberty.

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